



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OL, FFL

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order to confirm if the tenancy is on a month-to-month basis or for a two-year fixed term.

The hearing was conducted via teleconference and was attended by the landlord; her legal counsel; a translator and one of the tenants.

At the outset of the hearing, the landlord's counsel advised that he submitted the Application for Dispute Resolution on behalf of the landlord. However, I note that the application did not list the landlord as a party to the dispute – it listed counsel. As such, I amended, with the agreement of both parties, the landlord's Application to exclude counsel as a party and include the actual landlord as noted on the coversheet of this decision.

The parties agreed that they had both received each other's evidence packages that had been served in advance of this hearing, with one exception. The landlord's counsel provided that he served the tenant with evidence on the date of this hearing by email. The tenant testified that he had not checked his email this morning and was not aware of any email from legal counsel.

The landlord's counsel explained that the evidence had been misplaced in his email and was not discovered until the last possible moment.

Residential Tenancy Branch Rule of Procedure 3.11 states evidence must be served and submitted as soon as reasonably possible. Rule of Procedure 3.14 also states:

.....documentary and digital evidence that is intended to be relied upon at the hearing must be received by the respondent and the Residential Tenancy Branch not less than 14 days before the hearing.

In the event that a piece of evidence is not available when the applicant submits and serves their evidence, the arbitrator will apply Rule 3.17.

Rule of Procedure 3.17 allows that evidence not provided to the respondent in accordance with the *Residential Tenancy Act (Act)* or Rule 3.14 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant evidence and that it was not available at the time that their application was made or when they served and submitted their evidence. The arbitrator has the discretion to determine whether to accept documentary or digital evidence that does not meet the criteria established above provided that the acceptance of late evidence does not unreasonably prejudice one party or result in a breach of the principles of natural justice. Both parties must have the opportunity to be heard on the question of accepting late evidence.

I accept the tenant's testimony that he had not seen the email from counsel on the morning of the hearing and even if he had I am satisfied he may not have had an opportunity to review and be prepared to respond during the hearing. As a result, I have not considered the landlord's evidence submitted on the morning of this hearing. I did advise both parties that the landlord could discuss the evidence and I would accept oral submissions on it, but I would not consider the documentary evidence itself.

The landlord's counsel outlined they were seeking the following orders:

1. A declaration that the tenancy agreement dated June 28, 2021 is valid and enforceable;
2. An order that the tenant complies with the terms of the tenancy agreement including, but not limited to the payment of rent; and
3. An order that the tenancy agreement starts on May 1, 2021 and continues on a month-to-month basis until ended in accordance with the *Act*.

Counsel advised that at the time the landlord's Application was made (October 7, 2021) there had been some outstanding rent that has since been paid and that currently no rent had been paid for the month of November. As the issue of November rent was not identified, nor could it have been, at the time of this Application I advised the parties I would not be making any rulings on the issue of November rent in this decision.

I do note, however, that the tenant indicated that because of the pending sale of the residential property he had been uncertain as to who to pay rent to for the month of November. Landlord's counsel clarified that while there is an accepted offer to purchase the sale is not finalized until December 29, 2021. As such, I advised the tenant that until such time that the sale is completed, and the ownership of the land has been transferred he must pay rent to his current landlord.

I advised both parties the landlord does have remedies available under the *Act* should the tenant not pay rent such as ending the tenancy for the nonpayment of rent by issuing a 10 Day Notice to End Tenancy for Unpaid Rent.

As to the landlord's request for a declaration that the tenancy agreement submitted into evidence is valid and enforceable, I have determined that there is only one term that is under dispute between the parties and that is the term outlining if the tenancy is for a fixed term of two years or a month-to-month tenancy. As such, I have restricted this decision to the one term, all other terms, as long as they are compliant with the *Act* and regulations are enforceable and valid.

Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to an order confirming the tenancy is on a month-to-month basis and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 13, 62, 67, and 72 of the *Residential Tenancy Act (Act)*.

Background and Evidence

The parties acknowledge that prior to this current tenancy they had been in a previous tenancy relationship and that they entered into discussions to start a new tenancy as well as have the tenants complete some repairs/renovations to the residential property. They indicated that they discussed completing work and being compensated by a period of time where the tenants would not have to pay rent.

The tenants submit that part of the agreement they had was that the tenancy would be for at least two years in duration. The tenants' position is that they would not have invested the amount of money they had to make renovations for a tenancy that could be ended at any time. The tenants submitted they have spent over \$20,000.00 in renovations.

Both parties submitted a copy of a tenancy agreement signed by the landlord on June 28, 2021. I note the tenants' signatures are undated. The tenant could not recall the specific date that they signed the agreement but confirmed that it was prior to the start of the tenancy, which was May 1, 2021.

The landlord submitted that she was hospitalized at the time the tenants signed the tenancy agreement and both parties agreed that the landlord had her agent facilitate their signing of the agreement and that once signed by the tenants it was given to the landlord to sign. The landlord submitted that due to complications from her hospitalization she did not sign the document until June 28, 2021.

The tenancy agreement outlines, in clause 3 that the monthly rent is \$4,500.00 due on the 1st of each month. There is a handwritten notation that states: "May, June 2021 Rent Free", with two sets of initials. The agreement also states that a security deposit of \$2,250.00 and a pet damage deposit of \$2,250.00 were required.

As to the duration of the tenancy, the agreement shows that two boxes were checked in clause 2 which is entitled "Beginning and Term of the Agreement". The first box checked (Box A) stipulates that the tenancy starts on May 1, 2021 and continues on a month-to-month basis until ended in accordance with the *Act*. I note that neither Box B nor Box C are checked. Box C states that the tenancy "is for a fixed term ending on..." with space left to provide an end date to the tenancy. There is no end date listed.

I also note the precursor to box D states that if you choose box C, you also need to check and complete either Box D or E. Box D is checked and states: "At the end of this time, the tenancy will continue on a month-to-month basis, or another fixed length of time, unless the tenant gives notice to end tenancy at least one clear month before the end of the term.

If the parties had checked Box E, which would require the tenants to vacate the rental unit at the end of an original fixed term, there is an additional requirement for them both to initial the term. There is only one initial in this section, the male tenant confirmed that the initial was made by the female tenant.

The tenant testified that when they signed the tenancy agreement, they discussed with the landlord's agent that they had not agreed to a month-to-month tenancy but rather a fixed term of two years. The tenant stated the agent then made a handwritten note at the bottom of the second page confirming this discussion but that when they received

the tenancy agreement back from the landlord the second page did not have any handwritten notation.

In support of their position, the tenants have submitted copies of portions of some text message conversations. The first conversation, dated March 31, is between the female tenant and the landlord's 14 year old son, Jason. Jason wrote, in part:

"If you and Trent can be okay with 2 months free and 4500 per month we can go ahead sign the agreements right away and we will be very appreciated. And I'm hoping to sign contract with you for 2 years if you are okay with it." [reproduced as written]

The second text message conversation is undated but is between the female tenant and the landlord. Based on the content of the message and the testimony of the parties, it appears that this conversation was after the tenancy began; the tenants had completed some or all of the renovation work; and while the landlord was deciding whether or not she intended to sell the residential property, but before she signed the tenancy agreement.

The third conversation appears to be between the male tenant and the landlord in which the tenant refers, twice, to having a two-year fixed term tenancy and finishing up the renovations. None of the responses from the landlord address the fixed term aspect of the tenant's comments.

Analysis

Section 13 of the *Act* requires a landlord to prepare a tenancy agreement in writing which must comply with the requirements prescribed in the regulations and set out all of the following:

- (a) the standard terms;
- (b) the correct legal names of the landlord and tenant;
- (c) the address of the rental unit;
- (d) the date the tenancy agreement is entered into;
- (e) the address for service and telephone number of the landlord or the landlord's agent;
- (f) the agreed terms in respect of the following:
 - (i) the date on which the tenancy starts;

- (ii) if the tenancy is a periodic tenancy, whether it is on a weekly, monthly or other periodic basis;
- (iii) if the tenancy is a fixed term tenancy, the date on which the term ends;
- (iii.1) if the tenancy is a fixed term tenancy in circumstances prescribed under section 97 (2) (a.1), that the tenant must vacate the rental unit at the end of the term;
- (iv) the amount of rent payable for a specified period, and, if the rent varies with the number of occupants, the amount by which it varies;
- (v) the day in the month, or in the other period on which the tenancy is based, on which the rent is due;
- (vi) which services and facilities are included in the rent;
- (vii) the amount of any security deposit or pet damage deposit and the date the security deposit or pet damage deposit was or must be paid.

While parties may enter into negotiations prior to signing a tenancy agreement, ultimately it is what the parties agree to that forms the foundation of the tenancy. The purpose of a written tenancy agreement is to outline specifically what was agreed to by the parties. If the parties do not agree with any terms of the agreement, as with any contract, the agreement should not be signed by the party that disagrees with the wording or the term.

In the case before me, the parties signed the tenancy agreement. While the tenants submit that page two of the tenancy agreement has been altered, they can provide no evidence of such an alteration. As it is the tenants who assert the tenancy was for a fixed term, despite a tenancy agreement that states it is for a month-to-month tenancy, the burden rests with the tenants to provide sufficient evidence to establish that the tenancy was for a fixed term and the duration of that fixed term.

As such, I must rely upon the evidence before me to determine, on a balance of probabilities, if the tenants have established a fixed term.

First, I have considered the text messages submitted into evidence. Despite the lack of dates on the second and third conversations, from the testimony and documentary evidence of both parties and the fact that the landlord did not sign the tenancy agreement until June 28, 2021, I am satisfied that these conversations were conducted at some point after the tenancy began and the date the landlord signed the tenancy agreement or between May 1, 2021 and June 28, 2021.

As a result, I do not find that these text messages were intended to be considered as negotiating any of the terms of the tenancy agreement but rather statements of what the tenants believed the tenancy agreement stated, in relation to the term of the tenancy. I also note that the landlord did not confirm or deny the fixed term in her text message responses. Therefore, I find that these two specific conversations provide little insight to what had been agreed upon.

In relation to the first text message conversation dated March 31, 2021, I accept that these were, at least, partial conversations conducted for the purpose of negotiating the terms of the tenancy. I accept that, at the time, the landlord's son was acting as the landlord's agent and had authority to make decisions on the landlord's behalf, despite his age.

I make this finding because he specifically identifies that the landlord could not accept free rent for three months and countered with an offer of two months, leaving it open to the tenants to accept or reject that term. Additionally, the landlord's son states he is "hoping to sign contract with you for 2 years if you are okay with it". Again, the son appears to be acting as the landlord's agent in the negotiation.

So, I accept that as of March 31, 2021 the landlord, through her son, had agreed, in fact, had offered a fixed term of two years. However, as stated above, the negotiations themselves do not constitute the terms of the tenancy, it is the tenancy agreement itself that sets out the terms the tenants agree to and will dictate what was agreed to by both parties.

There was no evidence submitted for consideration in regard to any communication and/or negotiations that may have occurred during the period from March 31, 2021 (date of the text message) and the date the tenants signed the tenancy agreement prior to May 1, 2021.

In regard to the tenants' position that tenancy agreement signed included a different page 2, I have considered page 2 from each of the tenancy agreements that were submitted by parties. While I accept that I am viewing copies of the tenancy agreement that have been uploaded into the Dispute Management System and not the actual documents themselves, I find no evidence that any written notations were made on the bottom of the page at all. I make this finding as there do not appear to be any marks on the section of the documents that might indicate something written or that something that had been written had been removed.

I also note that there is a written notation, on page 2, under clause 3 entitled Rent regarding rent being free for the months of May and June 2021 and that this change has been initialed. As the parties agreed to make this modification on the document itself and in the specific section that deals with rent, I find it would be unlikely that the landlord's agent would have made a notation at the bottom of the page in regard to clause 2 rather than making the alterations in clause 2 as was done in clause 3.

In the alternative, if the parties wanted to change the terms from a month-to-month tenancy to a fixed term – they could have made the changes in clause 2 itself by completing the appropriate boxes and initialling any of the changes, prior to signing the agreement.

If I were to consider that the entire page 2 of the tenancy agreement had been replaced with a completely new page, I find it would be unlikely that the female tenant's initial would have appeared under Box E in clause 2. As the tenant has confirmed that the initial is that of the female tenant, I find page 2 was not replaced.

As a result, I find the tenants have failed to establish that the tenancy agreement, as signed, included a clause for a fixed term tenancy of two years. I find the tenancy agreement stipulates the tenancy is established on a month-to-month tenancy.

Conclusion

Based on the above, I order the tenancy began and continues as a month-to-month tenancy until ended in accordance with the *Act*.

As the landlord was successful in her Application, I find that she is entitled to monetary compensation pursuant to Section 67 and I grant a monetary order in the amount of **\$100.00** comprised of the fee paid by the landlord for this application. This order must be served on the tenants. If the tenants fail to comply with this order the landlord may file the order in the Provincial Court (Small Claims) and be enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: November 17, 2021